

CHAPTER 7 - PROCUREMENT

Introduction

The purpose of this chapter is to provide information about the federal requirements for procurement of supplies, equipment, and services. Additional information on procurement associated with construction projects is located in Chapter 9 – Construction & Labor Standards.

Grantee Responsibilities

The Department requires all grantees to adopt written Procurement Procedures and a written Code of Conduct prior to obtaining Release of Funds for a CDBG grant. A grantee must use procurement procedures that are in conformance with State and local laws and regulations, Federal law and the standards identified in 24 CFR Part 85 Chapter 36.

Warning: The grantee must not execute any contract for goods or services prior to the Department issuing the grantee a written Notice of Release of Funds with the exception of contracts for general administration services. The Department may issue pre-agreement letters that allow for the obligation of non-administrative costs prior to Release of Funds.

24 CFR Part 85 Chapter 36

This chapter focuses on 24 CFR Part 85 Chapter 36 which sets forth the standards that are applicable to procurement for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments. Rules governing the contents of bid specifications, especially the required federal provisions, are included. It also addresses the methods of procurement and all the rules governing the utilization of the methods. The remaining information under this regulation pertains to the bonding requirements and general contract provisions.

Procurement procedures do not apply, however, to officials of the grantee who are acting in their official capacity. Consequently, if a city council has officially designated an attorney as city attorney, or an engineer as city engineer, the individual so designated becomes an official of the city. As an official of the city performing Community Development Block Grant (CDBG) related duties, his/her legal or engineering service charges are eligible program costs to the extent that they are: (1) reasonable for the services provided; (2) follow an appointment made in accordance with state and local laws; and (3) the amount of compensation charged to the program will be based on payrolls documented and provided in accordance with generally accepted practices of state and local governments.

General Provisions

The standards and procedures for procurement are intended to ensure that supplies, equipment, construction, and other services are:

- obtained as efficiently and economically as possible; and,
- procured in a manner that provides, to the maximum extent practical, open and free competition.

Solicitations must explain all the requirements that the bidder/offeror has to meet for his or her bid/offer to be evaluated by the grantee. Solicitations for goods and services must be based on a clear and accurate description of the material, product, or service to be procured, and cannot contain features which unduly restrict competition. Some of the situations considered to be restrictive of competition include, but are not limited to:

- placing unreasonable qualifying requirements on firms;
- requiring unnecessary experience and excessive bonding;

- specifying only “brand name” products instead of allowing “an equal” product;
- non-competitive pricing practices between firms or affiliated companies; and
- non-competitive awards to consultants on retainer contracts.

Awards are to be made to the bidder/offeror whose bid/offer is responsive to the solicitation and is most advantageous to the grantee, price and other factors considered. Any and all bids may be rejected when it is in the grantee’s interest to do so. The grantee must ensure that the award is made only to responsible contractors possessing the ability to perform successfully under the terms and conditions of the proposed procurement. Consideration should be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

Summary of Federal Requirements

1. Records and files. According to 24 CFR 85.36(b)(9), the grantee must maintain records to detail the significant history of a procurement. The grantee must maintain files on the rationale for selecting the methods of procurement used, selection of contract type, the contractor selection/rejection process, and the basis for the cost or price of a contract.
2. Pre-qualified lists of vendors/contractors. If such lists are used, they must be current, developed through open solicitation, include adequate numbers of qualified sources, and must allow entry of other firms to qualify at any time during the solicitation period (24 CFR 85.36(c)(4)).
3. Unfair competitive advantage. To eliminate unfair competitive advantage, if the grantee has used a contractor to develop or draft specifications, requirements, statements of work, invitations for bids, and/or requests for proposals, the grantee should exclude that contractor from the competition for such.
4. Debarred/ineligible contractors. The grantee must ensure that awards are not made to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in federal assistance programs under Executive Order 12549, “Debarment and Suspension “ (24 CFR 85.35).
5. Written procedures for contractor selection. The grantee must have written selection procedures for procurement transactions, adequate to ensure that:
 - a. The purchase of unnecessary or duplicate items is avoided. Where appropriate, an analysis should be made of lease vs. purchase alternatives (24 CFR 85.36(b)(4));
 - b. Whenever possible, use of federal excess and surplus property, or of intergovernmental agreements for procurement or use of common goods and services should be considered as a way to foster greater economy and efficiency (24 CFR 85.36(b)(5) and (6));
 - c. All purchase orders (and contracts) are signed by the grantee’s authorized official(s);
 - d. Items delivered and paid for are consistent with the purchase order and/or contract for the goods or services;
 - e. Timely payment to vendors occurs once the order is delivered, inspected, accepted, and payment authorized;
 - f. A cost or price analysis is performed for every procurement action, including contract

modifications, and documentation to that effect is maintained in the grantee's files. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the grantee must make independent estimates before receiving bids or proposals (24 CFR 85.36(f)); and,

- g. Profit or fee is negotiated separately from price where competition is lacking or a cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of past performance, and industry rates for the area (24 CFR 85.36(f)(2)).
6. Contract pricing. The grantee must not use "cost plus a percentage of cost" pricing for contracts (24 CFR 85.36(f)(4)); in addition, the grantee should use "time and material" type contracts only after a determination is made that no other contract is suitable and the contract includes a ceiling price that the contractor exceeds at its own risk (24 CFR 85.36(b)(10)).
7. Protest procedures. The grantee must have protest procedures in place to handle and resolve disputes relating to procurement (24 CFR 85.36(b)(12)).
8. Documenting contractor performance. The grantee must have a documented system of contract administration for determining the adequacy of contractor performance (24 CFR 85.36(b)(2)).
9. Code of conduct. The grantee must have a written code of conduct governing employees, officers, or agents engaged in the award or administration of contracts (24 CFR 85.36(b)(3)).

Bonding and Insurance

For construction or facility improvement contracts or subcontracts exceeding \$100,000, the grantee must ensure that its procurement meets the minimum federal requirements (24 CFR 85.36(h)) for bid guarantees, performance bonds, and payment bonds. These include:

1. A bid guarantee from each bidder equivalent to 5% of the bid price. The bid guarantee must be a firm commitment in the form of a bid bond, certified check or other negotiable instrument as assurance that the bidder is prepared to execute a contract within the time specified for the bid amount;
2. A performance bond from the contractor for 100% of the contract price to secure the contractor's fulfillment of all obligations under the contract; and,
3. A payment bond from the contractor for 100% of the contract price, to assure payment of all persons supplying labor and material under the contract.

Use of Local, Small, Minority and/or Women-Owned Businesses

1. Federal regulations make it very clear that grantees should make every effort to use local business firms and contract with small, minority-owned, and women-owned businesses in the procurement process. Specifically, the grantee must take affirmative steps to use small firms, minority-owned firms, women-owned firms, or labor surplus area firms (24 CFR 85.36(e)). For example, the grantee should:
 - a. Incorporate such businesses in solicitation lists whenever they are potential sources;
 - b. Ensure that such businesses are solicited when identified as potential sources;
 - c. Divide procurement requirements, when economically feasible, to permit maximum participation of such businesses; and,

- d. Require prime contractors, when subcontracts are let, to take affirmative steps to select such firms.
2. In conformance with the requirements of Section 3 of the Housing and Community Development Act of 1968, to the greatest extent feasible, the grantee must award contracts for work to be performed to eligible business concerns located in or owned by residents of the target area to ensure that the employment and other economic opportunities generated by federal financial assistance for housing and community development programs shall, to the greatest extent feasible, be directed toward low- and very-low income persons, particularly those who are recipients of government assistance for housing (see 24 CFR 570.607(b)).

Note, however, that the desire to award contracts to local firms is not a legitimate excuse for avoiding an open and competitive procurement process.

Contract Language

Contracts for construction – See the bid package and contract requirements in Chapter 9 – Construction and Labor Standards.

Professional service contracts must include the following provisions:

General Administrative Provisions

- Effective date of the contract.
- Names and addresses of the firm and the grantee.
- Citation of the authority of the grantee under which the contract is entered into and the source of the funds.
- Conditions and terms under which the contract may be terminated by either party and remedies for violation/breach of contract.
- Procedures for amending or revising the contract.
- Names of representatives of municipality and firm who will act as a liaison for administration of the contract
- A clause prohibiting a transfer of any interest in the contract by the consultant
- Provisions requiring the consultant to maintain records and furnish reports

Scope of Services

- Detailed description of the extent and character of the work to be performed.
- Time for performance and completion of contract services, including project milestones, if any.
- Specification of materials or other services to be provided (i.e. maps, reports, etc.)

Method of Compensation

- Provisions for compensation for services including fee and or payment schedules and specification of maximum amount payable under the contract.

Federal Standard Provisions

- Compliance with Executive Order 11246, as amended (Required for service contractors only if the contractor has 50 or more employees and the contract is for more than \$50,000)
- Title VI of the Civil Rights Act of 1964 clause
- Section 109 of the Housing and Community Development Act of 1974 clause
- Section 3 compliance clause (Required only if the contract exceeds \$100,000)
- Access to Records/Maintenance of Records clause
- Age Discrimination Act of 1975, as amended
- Section 504 of the Rehabilitation Act of 1973, as amended

Procurement Options

Initial decision: Will the grantee select a third party to perform all or part of the grant-funded activity, using some method of procurement?

- If no, and all of the work will be done in-house, then the grantee will not have to meet any federal procurement requirements.
- If yes, the federal procurement requirements will apply.

Depending on the scarcity of the item or service desired and the size of the purchase, different methods of procurement are available under the federal regulations.

Starting the work:

In-House: If the grantee will use only its own staff to work on the grant, work may begin after the state contract is fully executed and the Department has provided a written Notice of Release of Funds. The only costs incurred prior to Release of Funds that are eligible for reimbursement from CDBG funds are general administration activity costs, unless a special pre-agreement is issued to the grantee.

Officials of the grantee who are acting in their official capacity are considered “in-house” and are eligible to be compensated for CDBG-related duties if certain conditions are met. For example, if a city council has officially designated an attorney as City Attorney or an engineer as City Engineer, the individual so designated becomes an official of the city. As an official of the city performing CDBG related duties, his/her legal or engineering service charges are eligible program costs to the extent that they are: (1) reasonable for the services provided; (2) follow an appointment made in accordance with state and local laws; and, (3) the amount of compensation charged to the program will be based on payrolls documented and provided in accordance with generally accepted practices of state and local governments.

The Department will disallow costs for grantee's that abuse the "in-house" provisions. For instance, appointments of "City Engineers" must not be made for the purpose of selecting an engineer to work on an anticipated CDBG project. The grantee must show evidence that they have a history of appointment, unrelated to any current or anticipated CDBG project.

Contracted: If the grantee wants to contract out for services, the grantee must go through a procurement process. The grantee must select the proper procurement method that meets all Federal, State and local laws for the type of good or service sought and the amount of the contract. The only contract the grantee may execute prior to the Department's issuance of a Notice of Release of Funds is for general administration services, unless a special pre-agreement is issued to the grantee. Contracts for general administration must be executed after Notice of Award.

If the work is hired out: Options for procuring a contractor. The grantee has several options:

1. Small purchase
2. Competitive sealed bid
3. Competitive proposals
4. Non-competitive proposals/sole source

No loss leader arrangements: The intent of federal regulations is to require maximum open and free competition. "Loss-leader" arrangements, where a consultant offers to prepare a grant application or preliminary engineering estimates at cut rates or at no cost in return for a future contract if the application is funded, are prohibited by federal regulations. Some firms may suggest this approach because costs incurred by a city or county prior to the award of a CDBG, such as preparation of the application or preliminary engineering studies, are not eligible for reimbursement with CDBG funds. However, loss-leader arrangements violate federal regulations which require "maximum open and free competition." Professional organizations also consider this practice unethical because it deprives the client of the benefits that can result from competition among competent, professional firms.

Selection of Engineers, Planners, or Administrative Consultants Prior to Grant Award -- Generally, the use of multi-services procurement and contracting is prohibited except for: i) when local officials decide to procure the services of an engineer to assist them with both preparation of preliminary engineering plans (which is not grant application preparation) and project engineering, in the event their community is selected for grant award; ii) when a community wants to conduct one procurement process to cover both grant preparation and grant administration; and, iii) when a community wants to conduct one procurement process to cover both planning grant application preparation and planning grant implementation.

Any agreement between the community and the engineer or consultant that includes preliminary and project engineering or grant writing and administration services would have to be contingent upon the award of CDBG funds. Local officials would have to follow the procedures for Competitive Proposals.

Note about the procurement methods: Among the procurement approaches described below, the competitive sealed bid resulting in a firm, fixed price contract is the preferred procurement approach when there are numerous available and qualified providers, when the requirements and specifications are thoroughly detailed and are unlikely to change, and where the grantee has the opportunity to make the provider assume a large share of the risk for non-performance.

1. Small Purchase [24 CFR 85.36 (d)(1)]

The Department considers procurement by small purchase procedures best suited to obtaining small quantities of supplies. Grantees may follow either their local small purchase procurement policy or the federal policy. If the local policy is used, it must be at least as stringent as the federal policy, described below.

The small purchase method may be used for procurement of \$100,000 or less in the aggregate, per 24 CFR 85.36(d)(1). A procurement of more than \$100,000 may not be inappropriately broken up into smaller components solely to qualify for the small purchase approach.

Competition is sought through oral or written price quotations. The grantee must document the receipt of an adequate number (usually at least three) of price or rate quotations from qualified vendors.

1. Identify in writing the item to be procured.
2. Solicit in writing, written quotes from at least three qualified bidders. Verbal quotes, documented by the grantee in writing, are acceptable for purchases of less than \$500.
3. Identify the lowest responsible bidder.
4. Notify each bidder in writing as to whether or not they are the apparent low bidder.
5. Execute a contract to the lowest responsible bidder.

2. Competitive Sealed Bid [24 CFR 85.36 (d)(2)]

The Department considers this method of procurement best suited to obtaining contractors for construction projects and for large quantities of goods or materials. This method must lend itself to a firm, fixed price contract (lump sum or unit price) where the selection can be made principally on the basis of price.

- a.. The grantee must advertise the invitation for bids in publications of general circulation, solicit bids from an adequate number of known suppliers, providing them sufficient time to respond prior to bid opening;
- b. The invitation for bids must include complete and accurate specifications and pertinent attachments, and clearly define items or services needed, in sufficient detail for the bidders to properly respond;
- c. Bids must be opened publicly at the time and place stated in the invitation for bids;

- d. The grantee must receive at least two or more responsible bids for each procurement transaction; and,
- e. If awarded, a firm fixed-price contract award must be made in writing to the lowest responsive and responsible bidder. The grantee can, however, decide not to make the award to any of the bidders.

3. Competitive Proposals [24 CFR 85.36(d)(3)]

The Department considers this procurement method best suited to obtaining professional services. This is normally conducted with more than one source submitting an offer, and either a fixed-price or not-to-exceed type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. This method has two sub-parts—the Request for Proposal and the Request for Qualifications.

The review process for both statements of qualification and proposals in response to an RFP should be thorough, uniform, and well documented. The department prefers that this review be conducted by a committee or board which, to the extent possible, includes persons with technical skills. Reviewers should have no potential conflicts of interest with the firms or individuals under review, such as family relationships, close friendships, or business partnerships. (Refer to Code of Federal Regulations 24 CFR 85.36, paragraph (b) procurement standards, which in part states: “grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in the selection, or awarding or administration of a contract supported by federal funds if a conflict of interest, real or apparent, would be involved.”)

EVALUATION CRITERIA

- Specialized experience or technical expertise of the firm and its personnel in connection with the type of services to be provided and the complexity of the project
- Past record of performance on contracts with the municipality and other clients, including quality of work, timeliness and cost control
- Capacity of firm to perform the work within time limitations, taking into consideration the current and planned workload of the firm
- Familiarity of the firm with the type of problems applicable to the project
- The relative importance of these criteria can be indicated by assigning weights to each

Request for Proposals

- a. The Request for Proposals (RFP) must clearly and accurately state the technical requirements for the goods and services required
 - It should specify the scope of services and the type of contract to be provided; cost reimbursement (also known as cost plus fixed fee); fixed price; or per diem contract. Cost plus a percentage of cost contracts are unacceptable to the department and must not be used.
 - The RFP also should specify the cost and pricing data required to support the proposed cost, anticipated start and completion dates, and evaluation criteria to be used in ranking proposals. The grantee should make available pertinent materials, such as reports, maps

and site plans to assist the bidders in preparing proposals. For complicated projects, the grantee may wish to conduct a pre-bid conference to discuss the project, describe available materials, and explain relevant CDBG contract regulations.

- b. The grantee must publicize the RFP, and to the maximum extent practicable, honor reasonable requests by parties to have an opportunity to compete;
- c. Proposals must be solicited from an adequate number of qualified sources, consistent with the nature and requirements of the procurement;
- d. The grantee must conduct a technical evaluation of the submitted proposals to identify the responsible offerors;
- e. As necessary, the grantee must conduct negotiations with those offerors who are deemed responsive and responsible and fall within a competitive price range, based on the grantee's evaluation of the bidders' pricing and technical proposals. After negotiations, these bidders may be given the opportunity to submit a "best and final" offer; and
- f. The grantee must award the contract to the most responsive and responsible offeror after price and other factors are considered through scoring the proposals or "best and final" offers according to predetermined evaluation criteria. The successful proposal/offeror must clearly be the most advantageous source of the goods and services.

Request for Qualifications

For procurement involving architecture or engineering services, the grantee may use the Request for Qualifications (RFQ) competitive proposal procedure whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. In these instances, price is not used as a selection factor. The grantee should review and rank every statement received, and either contact the first two or three choices to request a proposal covering the scope of services and estimated costs, or select the top firm and begin negotiations.

Once the most-qualified firm is identified, only that firm is asked for a price proposal, which is subject to negotiation of a fair and reasonable price. If negotiations with the selected firm are unsuccessful, this process is repeated with the next highest-ranked firm, until a fair and reasonably priced contract can be awarded.

The grantee must take care to document the basis for its determination of the most qualified competitor and the reasonableness of the contract price. This qualifications-based approach to the competitive proposals method may not be used to purchase other than architectural and engineering services (24 CFR 85.36(d)(3)(v)).

For applicants' information, the above-cited federal rule relating to the procurement of architectural and engineering (A/E) services is quoted verbatim:

"Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E)

professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort."

This means that:

- ▶ Qualifications-based procurement can be used only for A/E services.
- ▶ A Request for Qualifications may be issued.
- ▶ The competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation.
- ▶ An RFQ cannot be used to purchase other types of services, even though A/E firms are potential sources to perform other types of services.

In addition, the federal procurement regulations generally discourage the use of local geographical preferences in the evaluation of bids or proposals except where mandated by federal statutes, due to the restrictions on open competition, which result. However, in procuring architectural and engineering services, geographic location is permitted as a selection criteria provided this criterion leaves an appropriate number of qualified firms (24 CFR 85.36(c)(2)).

4. Non-Competitive Proposals/Sole Source [24 CFR Part 85.36 (d)(4)]

This method may be used only under very limited circumstances and **the grantee must obtain Department approval before using this method.**

When requesting permission to use this method, the grantee will have to show that another method of procurement was not feasible because:

- a. the item or service was only available from a single source;
- b. a public emergency or condition requiring urgency existed which did not permit the use of competitive procurement; or
- c. competition was determined to be inadequate after solicitation of proposals from a number of sources.

CONTRACT FILE

The grantee must establish a contract file and monitor the contract to assure that the contract is completed in a satisfactory and timely manner. The contract file must contain:

- Description of method used to select consultants
- Qualification statements, RFP and proposal(s) received
- Negotiation methods
- Cost and pricing data
- Contract for services
- Records of partial payments and supporting documentation (in financial management files); and

- Contract amendments, if any, and rationale for amendment

Designating Grant Administration to Another Governmental Entity

A grantee (which is required to be a unit of general local government under CDBG requirements) may conduct the activities of grant administration for itself, without a procurement process. This statement seems self-evident, but it is included here because the capacity to do one's own grant administration activities forms the foundation for also allowing the grantee to designate (delegate) grant administration activities to some other governmental entities without a procurement process.

The Department looks to Nebraska state law to determine what types of other governmental entities are considered extensions of the grantee such that those other governmental entities will be allowed to be designated by a grantee to do grant administration without a procurement process.

Development regions, and subsequently formed development districts based on those regions, are recognized and statutorily authorized in Sections 13-1901 to 13-1907, Nebraska Revised Statutes (Reissue 1997). Development districts formed pursuant to, and meeting the requirements of, those development district statutes are considered to be an extension of the grantee (assuming the grantee is a member of the development district), and grant administration may be delegated to such districts without a procurement process.

The Interlocal Cooperation Act, Sections 13-801 to 13-827, Nebraska Revised Statutes, (Reissue 1997 and Cumulative Supplement 2002) allows local governmental entities to enter into agreements for their mutual benefit. If such an interlocal agreement were entered into by a grantee and other governmental entities (whether one or more), and such agreement addressed the issue of CDBG grant administration, and authorized one of the agreeing governmental entities to do such grant administration work on behalf of other agreeing governmental entities, this arrangement would be recognized by the Department as not requiring a procurement process. Similarly, the Joint Public Agency Act, Sections 13-2501 to 13-2550, Nebraska Revised Statutes (Cumulative Supplement 2002) is another authorizing vehicle for interlocal agreements which would be recognized by the Department.

Subrecipients

A subrecipient is a public or private non-profit agency or organization receiving CDBG funds from a grantee or another subrecipient to undertake eligible activities. Another way to say this is that subrecipients are organizations that are **provided** CDBG funds by a grantee **for their use** in carrying out agreed-upon, eligible activities.

Warning: before a grantee enters into an agreement with a subrecipient they must consult with the Department

References

- 24 CFR 85, referred to as the "HUD common rule," establishes administrative requirements for grants to local government. 24 CFR 85.36 specifically addresses procurement. This chapter is largely based on the language contained in 24 CFR 85.36.
- 24 CFR 570.502(a)(12) invokes the "HUD common rule" for the State CDBG program.
- Federal Circular OMB A-87 establishes principles and standards for determining costs applicable to grants, contracts, and other agreements with State and local governments.
- Section 3 of the Housing and Urban Development Act of 1968, as amended, provides that to the

greatest extent feasible, opportunities for training and employment that arise through State CDBG-financed projects shall be given to lower-income residents of a project area, and that contracts awarded in connection with such projects be awarded to businesses located in the project area or businesses owned, in substantial part, by residents of the project area.

- Section 109 of the Housing and Community Development Act of 1974, as amended, provides that no person shall be excluded from participation or employment, or be denied benefits, or be subjected to discrimination on the basis of race, color, national origin, or sex under any program or activity funded in whole or in part by the CDBG Program.
- Title VII, Civil Rights Act of 1964, provides that no person shall be excluded from participation, denied program benefits, or subjected to discrimination based on race, color, or national origin under any program or activity receiving federal financial assistance.
- Executive Order 11246, as amended, provides that no person shall be discriminated against on the basis of race, color, religion, sex, or national origin in any phase of employment during the performance of federal or federally-assisted construction contracts.

The following pages (8-14 through 8-20) contain a sample Professional Services Contract. This sample contract is originally from a previous Administrative Manual and some of the references in the contract are outdated. Below is a list of updated Federal Regulations and the original ones in the sample contract along with links.

Records

OMB Circular A102 – 24 CFR 85.42

<http://www.whitehouse.gov/omb/circulars/index.html>

<http://www.access.gpo.gov/nara/cfr/cfr-table-search.html>

Executive Order 11246

<http://www.hud.gov/offices/ftheo/FHLaws/index.cfm>

<http://www.hud.gov/offices/ftheo/FHLaws/EXO11246.cfm>

<http://www.dol.gov/esa/regs/statutes/ofccp/eo11246.htm>

<http://www.eeoc.gov/abouteeoc/35th/thelaw/eo-11246.html>

Title VI of the Civil Rights Act of 1964

<http://www.hud.gov/offices/ftheo/FHLaws/index.cfm>

<http://www.usdoj.gov/crt/cor/coord/titlevi.htm>

<http://www.usdoj.gov/crt/cor/coord/titlevistat.htm>

<http://www.hud.gov/progdesc/titl-vi.cfm>

Section 109 of the HCDA of 1974

<http://www.hud.gov/offices/ftheo/FHLaws/index.cfm>

<http://www.hud.gov/progdesc/sec-109.cfm>

<http://www.hud.gov/offices/ftheo/FHLaws/109.cfm>

Section 3 of the HUD Act of 1968

<http://www.hud.gov/offices/ftheo/progdesc/emp-lowr.cfm>

<http://www.hud.gov/offices/ftheo/section3/Section3.pdf>

Fair Housing - 24 CFR 135

<http://www.access.gpo.gov/nara/cfr/cfr-table-search.html#page1>

Age Discrimination Act of 1975

<http://www.hud.gov/offices/ftheo/FHLaws/index.cfm>

http://www.dol.gov/oasam/regs/statutes/age_act.htm

<http://www.dol.gov/dol/topic/discrimination/agedisc.htm>

Section 504 of the Rehab Act of 1973

<http://www.hud.gov/offices/ftheo/FHLaws/index.cfm>

SAMPLE PROFESSIONAL SERVICES AGREEMENT

PROFESSIONAL SERVICE/CONSULTANT AGREEMENT

For

_____, NEBRASKA

----- Project Title -----

THIS AGREEMENT made and entered into by and between the **Village/City/County of _____, Nebraska** (hereinafter referred to as the Village/City/County) and _____ (hereinafter referred to as the Consultant).

WITNESSES THAT:

WHEREAS, the Village/City/County and the Consultant are desirous of entering into a contract to formalize their relationship, and

WHEREAS, pursuant to Title I of the Housing and Community Development Act of 1974, as amended through 1981 and 24 CFR 570, the State of Nebraska Department of Economic Development (the Department) is authorized by the federal Department of Housing and Urban Development (HUD) to provide Community Development Block Grant Program funds (hereinafter referred to as CDBG funds) to units of local government selected to undertake and carry out certain programs and projects under the Nebraska State Community Development Block Grant Program in compliance with all applicable local, state and federal laws, regulations and policies, and

WHEREAS, the Village/City/County, as part of its 20__ CDBG grant agreement with the Department, under contract number _____, has been awarded CDBG funds for the purposes set forth herein, and

WHEREAS, the Scope of Work included in this contract is authorized as part of the Village/City/County 's approved CDBG program, and

WHEREAS, it would be beneficial to the Village/City/County to utilize the Consultant as an independent entity to accomplish the Scope of Work set forth herein and such endeavor would tend to best accomplish the objectives of the local CDBG program.

NOW, THEREFORE, in consideration of the mutual promises, covenants and provisions contained herein and the mutual benefits to be derived therefrom, the parties hereto agree as follows:

1. Services to be Provided by the Parties

- a. The Consultant shall complete in a satisfactory and proper manner as determined by the Village/City/County the work activities described in the Scope of Work (**Attachment #1** to the contract).
- b. The Village/City/County will provide such assistance and guidance as may be required to support the objectives set forth in the Scope of Work and will provide compensation for services as set forth in Section 3 below.

2. Time of Performance

The effective date of this contract shall be the date the parties sign and complete execution of the contract. The termination date of the contract shall be _____.

SAMPLE PROFESSIONAL SERVICES AGREEMENT

3. Consideration

The Village/City/County shall reimburse the Consultant in accordance with the Payment Schedule described in **Attachment #2** to the contract for all allowable expenses agreed upon by the parties to complete the Scope of Work. In no event shall the total amount reimbursed by the Village/City/County exceed the sum of \$ _____ (_____dollars). Reimbursement under this contract shall be based on billings, supported by appropriate documentation of costs actually incurred. It is expressly understood that claims for reimbursement shall not be submitted in excess of actual, immediate cash requirements necessary to carry out the purposes of this agreement.

It is also understood that this contract is funded in whole or in part with funds through the State of Nebraska Community Development Block Grant Program as administered by the Department and is subject to those regulations and restrictions normally associated with federally funded programs and any other requirements that the state may prescribe.

4. Records

The Consultant agrees to maintain such records and follow such procedures as may be required under OMB Circular A102 and any such procedures that the Village/City/County or the Department may prescribe. In general such records will include information pertaining to the contract, obligations and unobligated balances, assets and liabilities, outlays, equal opportunity, labor standards (as appropriate), and performance.

All such records and all other records pertinent to this contract and work undertaken under this contract shall be retained by the Consultant for a period of three years after the final audit of the Village/City/County 's CDBG project, unless a longer period is required to resolve audit findings or litigation. In such cases, the Village/City/County shall request a longer period for record retention.

The Village/City/County, the Department and duly authorized officials of the state and federal government shall have full access and the right to examine any pertinent documents, papers, records and books of the Consultant involving transactions to this local program and contract.

5. Relationship

The relationship of the Consultant to the Village/City/County shall be that of an independent Consultant rendering professional services. The Consultant shall have no authority to execute contracts or to make commitments on behalf of the Village and nothing contained herein shall be deemed to create the relationship of employer and employee or principal and agent between the Village/City/County and the Consultant.

6. Suspension, Termination and Close Out

If the Consultant fails to comply with the terms and conditions of this contract the Village/City/County may pursue such remedies as are legally available including, but not limited to the suspension or termination of this contract in the manner specified herein:

- a. Suspension:** If the Consultant fails to comply with the terms and conditions of this contract, or whenever the Consultant is unable to substantiate full compliance with the provisions of this contract, the Village/City/County may suspend the contract pending corrective actions or investigation, effective not less than 7 days following written notification to the Consultant or its authorized representative. The suspension will remain in full force and effect until the Consultant has taken corrective action to the satisfaction of the Village/City/County and is able to substantiate its full compliance with the terms and conditions of this contract. No obligations incurred by the Consultant

SAMPLE PROFESSIONAL SERVICES AGREEMENT

or its authorized representatives during the period of suspension will be allowable under the contract except;

(1) Reasonable, proper and otherwise allowable costs which the Consultant could not avoid during the period of suspension.

(2) If upon investigation, the Consultant is able to substantiate complete compliance with the terms and conditions of this contract, otherwise allowable costs incurred during the period of suspension will be allowed.

(3) In the event all or any portion of the work prepared or partially prepared by the Consultant be suspended, abandoned, or otherwise terminated the Village/City/County shall pay the Consultant for work performed to the satisfaction of the Village/City/County, in accordance with the percentage of the work completed.

b. Termination for Cause: If the Consultant fails to comply with the terms and conditions of this contract and any of the following conditions exist;

(1) The lack of compliance with the provisions of this contract are of such scope and nature that the Village/City/County deems continuation of the contract to be substantially detrimental to the interests of the Village/City/County;

(2) The Consultant has failed to take satisfactory action as directed by the Village/City/County or its authorized representative within the time specified by same;

(3) The Consultant has failed within the time specified by the Village/City/County or its authorized representative to satisfactorily substantiate its compliance with the terms and conditions of this contract; then, the Village/City/County may terminate this contract in whole or in part, and thereupon shall notify the Consultant of the termination, the reasons therefore, and the effective date provided such effective date shall not be prior to notification of the Consultant. After this effective date, no charges incurred under any terminated portions are allowable.

c. Termination for Other Grounds: This contract may also be terminated in whole or in part:

(1) By the Village/City/County, with the consent of the Consultant, or by the Consultant with the consent of the Village/City/County, in which case the two parties shall devise by mutual agreement, the conditions of termination including effective date and in case of termination in part, that portion to be terminated.

(2) If the funds allocated by the Village/City/County via this contract are from anticipated sources of revenue, and if the anticipated sources of revenue do not become available for use in purchasing said services.

(3) In the event the Village/City/County fails to pay the Consultant promptly or within 60 days after invoices are rendered, the Village/City/County agrees that the Consultant shall have the right to consider said default a breach of this agreement and the duties of the Consultant under this agreement terminated. In such an event, the Village/City/County shall then promptly pay the Consultant for all services performed and all allowable expenses incurred.

(4) The Village/City/County may terminate this contract at any time giving at least 10 days notice in writing to the Consultant. If the contract is terminated for convenience of the Village/City/County as provided herein, the Consultant will be paid for time provided and expenses incurred up to the termination date.

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7. Changes, Amendments, Modifications

The Village/City/County may, from time to time, require changes or modifications in the scope of services to be performed hereunder. Such changes, including any increase or decrease in the amount of compensation therefore, which are mutually agreed upon by the Village/City/County and the Consultant shall be incorporated in written amendments to this contract.

8. Personnel

The Consultant represents that he/she has, or will secure at his/her own expense, all personnel required in performing the services under this contract. Such personnel shall not be employees or have any contractual relationship to the Village/City/County.

All services required hereunder will be performed by the Consultant or under his supervision and all personnel engaged in the work shall be fully qualified and shall be authorized or permitted under state or local law to perform such services.

None of the work or services covered by this contract shall be subcontracted without prior written approval of the Village/City/County. Any work or services subcontracted hereunder shall be specified by written contract or agreement and shall be subject to each provision of this contract.

9. Assignability

The Consultant shall not assign any interest on this contract, and shall not transfer any interest on this contract (whether by assignment or notation), without prior written consent of the Village/City/County thereto: Provided, however, that claims for money by the Consultant from the Village/City/County under this contract may be assigned to a bank, trust company, or other financial institutions without such approval. Written notice of any such assignment or transfer shall be furnished promptly to the Village/City/County.

10. Reports and Information

The Consultant, at such times and in such forms as the Village/City/County may require, shall furnish the Village/City/County such periodic reports as it may request pertaining to the work or services undertaken pursuant to this contract, the costs and obligations incurred or to be incurred in connection therewith, and any other matters covered by this contract.

11. Findings Confidential

All of the reports, information, data, etc., prepared or assembled by the Consultant under this contract are confidential and the Consultant agrees that they shall not be made available to any individual or organization without prior written approval of the Village/City/County.

12. Copyright

No reports, maps, or other documents produced in whole or in part under this contract shall be subject of an application for copyright by or on behalf of the Consultant.

13. Compliance With Local Laws

The Consultant shall comply with all applicable laws, ordinances and codes of the state and local governments and the Consultant shall save the Village/City/County harmless with respect to any damages arising from any tort done in performing any of the work embraced by this contract.

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14. Title VI of the Civil Rights Act of 1964

Under Title VI of the Civil Rights Act of 1964, no person shall, on the grounds of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

15. Section 109 of the Housing and Community Development Act of 1974

No person in the United States shall on the grounds of race, color, national origin, or sex be excluded from participation in, be denied benefits of or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this title.

16. Section 3 Compliance in the Provision of Training, Employment and Business Opportunities

- a. The work to be performed under this contract is on a project assisted under a program providing direct federal financial assistance from the Department of Housing and Urban Development and is subject to the requirements of Section 3 of the Housing and Urban Development Act of 1968, as amended, 12 U.S.C. 1701u. Section 3 requires that to the greatest extent feasible opportunities for training and employment be given lower income residents of the project area and contracts for work in connection with the project be awarded to business concerns which are located in, or owned in substantial part by persons residing in the area of the project.
- b. The parties to this contract will comply with the provisions of said Section 3. The parties to this contract certify and agree that they are under no contractual or other disability which would prevent them from complying with these provisions.
- c. The consultant will send to each labor organization or representative or workers with which he/she has collective bargaining agreement or other contract or understanding, if any, a notice advising the said labor organization or workers' representative of his/her commitments under this Section 3 clause and shall post copies of the notice in conspicuous places available to employees and applicants for employment or training.
- d. The Consultant will include this Section 3 clause in every subcontract for work in connection with the project and will, at the direction of the applicant for, or receipt of federal financial assistance, take appropriate action pursuant to the subcontract upon a finding that the subcontractor is in violation of regulations issued by the Secretary of Housing and Urban Development, 24 CFR Part 135. The Consultant will not subcontract with any subcontractor where it has notice or knowledge that the latter has been found in violation of regulations under 24 CFR Part 135 and will not let any subcontract unless the subcontractor has first provided it with a preliminary statement of ability to comply with the requirements of these regulations.
- e. Compliance with the provisions of Section 3, the regulations set forth in 24 CFR Part 135, and all applicable rules and orders of the Department issued hereunder prior to the execution of the contract, shall be a condition of the federal financial assistance provided to the project, binding upon the applicant or recipient for such assistance, its successors and assigns. Failure to fulfill these requirements shall subject the applicant or recipient, its consultants and subcontractors, its successors and assigns to those sanctions specified by the grant or loan agreement or contract through which federal assistance is provided, and to such sanctions as are specified by 24 CFR Part 135.

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17. Age Discrimination Act of 1975, As Amended (42 U.S.C. 6101, et.seq.).

The law provides that no person will be excluded from participation, denied program benefits or subjected to discrimination on the basis of age under any program or activity receiving federal funding assistance.

18. Section 504 of the Rehabilitation Act of 1973, As Amended (29 U.S.C. 794).

The law provides that no otherwise qualified individual will, solely by reason of his or her handicap, be excluded from participation (including employment), denied program benefits or subjected to discrimination under any program or activity receiving federal assistance funds.

19. Executive Order 11246, As Amended.

This Order applies to all federally assisted construction contracts and subcontracts. The Grantee and subcontractors, if any, will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. The Grantee and subcontractors, if any, will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin.

20. Conflict of Interest

No officer, employee or agent of the Grantee who will participate in the selection, the award, or the administration of this grant may obtain a personal or financial interest or benefit from the activity or have an interest in any contract, subcontract or agreement with respect thereto, or the proceeds thereunder either for themselves or those with whom they have family or business ties, during their tenure or for one year thereafter. It is further required that this stipulation be included in all subcontracts to this contract. Upon written request, exceptions may be granted upon a case by case basis when it is determined that such an exception will serve to further the purposes of the Act and the effective and efficient administration of the recipient's program or project. These exceptions are granted by the Department.

21. Audits and Inspections

The Village/City/County, the Department, the State Auditor and HUD or their delegates shall have the right to review and monitor the financial and other components of the work and services provided and undertaken as part of the CDBG project and this contract, by whatever legal and reasonable means are deemed expedient by the Village/City/County, DED, the State Auditor and HUD.

22. Hold Harmless

The Consultant agrees to indemnify and hold harmless the Village/City/County, its appointed and elective officers and employees, from and against all loss and expense, including attorney's fees and costs by reason of any and all claims and demands upon the Village/City/County, its elected or appointed officers and employees from damages sustained by any person or persons, arising out of or in consequence of the Consultant's and its agents' negligent performance of work associated with this agreement. The Consultant shall not be liable for property and bodily injury as may result from the negligence of any construction contractor or construction subcontractor.

This agreement contains all terms and conditions agreed to by the Village/City/County and the Consultant. The attachments to this agreement are identified as follows:

SAMPLE PROFESSIONAL SERVICES AGREEMENT

Attachment #1: SCOPE OF WORK and FEES for _____, NEBRASKA
for _____

_____ consisting of _____ Pages.

Attachment #2: Payment Schedule for _____, NEBRASKA for _____

_____ consisting of _____ Pages.

WITNESS WHEREOF, the Village/City/County and the Consultant have executed this contract agreement as of the date and year last written below.

Village/City/County (_____, Nebraska)

By _____

Title _____

Date _____

CONSULTANT (_____)

By _____

Title _____

Date _____

Approved as to legal form:

Village/City/County Attorney

By _____

Date _____

Revisions to Procurement Chapter

Italics/Underline = Addition

~~Strikethrough = Removal~~

Changed Font from Courier New and Times New Roman to Arial

Page 1

Procurement procedures do not apply, however, to officials of the grantee who are acting in their official capacity. Consequently, if a city council has officially designated an attorney as city attorney, or an engineer as city engineer, the individual so designated becomes an official of the city. As an official of the city performing Community Development Block Grant (CDBG) related duties, his/her legal or engineering service charges are eligible program costs to the extent that they are: (1) reasonable for the services provided; (2) follow an appointment made in accordance with state and local laws; and (3) the amount of compensation charged to the program will be based on payrolls documented and provided in accordance with generally accepted practices of state and local governments.

Monitoring Report Conclusion

Page 4

Names of representatives of municipality and firm who will act as a liaison for administration of the contract

A clause prohibiting a transfer of any interest in the contract by the consultant

Provisions requiring the consultant to maintain records and furnish reports

Page 5

Age Discrimination Act of 1975, as amended

Section 504 of the Rehabilitation Act of 1973, as amended

Page 8 through 9

The review process for both statements of qualification and proposals in response to an RFP should be thorough, uniform, and well documented. The department prefers that this review be conducted by a committee or board which, to the extent possible, includes persons with technical skills. Reviewers should have no potential conflicts of interest with the firms or individuals under review, such as family relationships, close friendships, or business partnerships. (Refer to Code of Federal Regulations 24 CFR 85.36, paragraph (b) procurement standards, which in part states: "grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in the selection, or awarding or administration of a contract supported by federal funds if a conflict of interest, real or apparent, would be involved.")

EVALUATION CRITERIA

- Specialized experience or technical expertise of the firm and its personnel in connection with the type of services to be provided and the complexity of the project
- Past record of performance on contracts with the municipality and other clients, including quality of work, timeliness and cost control
- Capacity of firm to perform the work within time limitations, taking into consideration the current and planned workload of the firm
- Familiarity of the firm with the type of problems applicable to the project
- The relative importance of these criteria can be indicated by assigning weights to each

- it should specify the scope of services and the type of contract to be provided; cost reimbursement (also known as cost plus fixed fee); fixed price; or per diem contract. Cost plus a percentage of cost contracts are unacceptable to the department and must not be used
- The RFP also should specify the cost and pricing data required to support the proposed cost, anticipated start and completion dates, and evaluation criteria to be used in ranking proposals. The grantee should make available pertinent materials, such as reports, maps and site plans to assist the

bidder in preparing proposals. For complicated projects, the grantee may wish to conduct a pre-bid conference to discuss the project, describe available materials, and explain relevant CDBG contract regulations.

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The grantee should review and rank every statement received, and either contact the first two or three choices to request a proposal covering the scope of services and estimated costs, or select the top firm and begin negotiations.

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CONTRACT FILE

The grantee must establish a contract file and monitor the contract to assure that the contract is completed in a satisfactory and timely manner. The contract file must contain:

Description of method used to select consultants

Qualification statements, RFP and proposal(s) received

Negotiation methods

Cost and pricing data

Contract for services

Records of partial payments and supporting documentation (in financial management files); and

Contract amendments, if any, and rationale for amendment

Pages 13-20

The Sample Professional Services Contract was included in the Procurement Section, This contract is originally from the 1995 CDBG Certification Administration Manual.